Supreme Court, U.S.
FILED
AUG 10 2010
OFFICE OF THE CLERK

No. 10-21

In the Supreme Court of the United States

KEVIN H. MCKENNA *(Pro-Se)*

Petitioner,

v.

NESTLE PURINA PETCARE COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Kevin H. McKenna
Petitioner – Pro-Se
4885 Adamsville Road
Zanesville, Ohio 43701
(740) 452-3124

August 7, 2010

QUESTION PRESENTED

Because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, *and* sanctioned such a departure by a lower court, the petitioner humbly requests:

Will the United States Supreme Court *please* grant the *pro se* petitioner in this case an exercise of this Court's supervisory power?

Page Intentionally Left Blank

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITIONERS REPLY TO RESPONDENT'S BRIEF IN OPPOSITION 1

I. Summary of Position 1

II. "Attorney Misconduct" Conflict of Interest ... 2

III. FRAUD - From Front Cover, to Back Cover 3

A. Front Cover - Fraudulent "Corporate Disclosure Statement" 3

B. Back Cover - Fraudulent "Issues Not Raised Before the Lower Courts" 4

IV. Respondent's Egregious Violation of a Standing Protective Order 6

V. Respondent's Diatribe on *Twombly* is Inapposite to the Material Issues in the Case 10

TABLE OF CONTENTS
(continued)

A. *Twombly* is Inapposite to Petitioner's Reliance on *Conley*.....10

B. *Twombly* is Not the Legal Basis Relied Upon by Lower Court's in Dismissal of McKenna's Complaint 10

VI. Respondent Concedes Nestle's Motion and Lower Courts' Dismissal of McKenna's Complaint was unwarranted..11

A. "Count 1" of McKenna's Complaint.....10

B. "Count 2" of McKenna's Complaint.....13

VII. Other Acts of "Attorney Misconduct" Perpetrated Upon the Federal Judiciary..14

Pending Circuit Court Complaint:.....14

Pending District Court Complaint:.....14

CONCLUSION.....15

TABLE OF AUTHORITIES

Page

CASES

Bell Atlantic Corp. v. Twombly,
550 US 544, 127 S.Ct. 1955 (2007) 10,11

Burlington N. & SFR CO. v. White,
547 US 53 (2006) 2

Conley v. Gibson,
355 US 41 (1957) 10

Fenton v. HiSAN,
174 F.3d 827 (6th Cir. 1999) 11

Foman v. Davis,
371 US 178 (1962) 10

Hawkins v. Anheuser- Busch, Inc.,
517 F.3d 321 (6th Cir. 2008) 11

OTHER AUTHORITIES

Ohio Rules of Professional Conduct 2

PETITIONERS REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I. Summary of Position:

Respondents' Opposition Brief completely fails to address the perversely wrongful standards applied by the Respondent and the lower Courts' in dismissal of McKenna's emotional/psychic harms which McKenna inarguably suffered as direct result of Respondent's actions. Petitioner effectively concedes Petitioner sexually harassed McKenna, but "requests" this Court not address the issue, *but for* Respondent fraudulently misrepresents the issue was not before the lower Courts. Respondent does not dispute Respondent's Counsel of Record perpetrated acts of fraud and evidence tampering upon the District Court and upon Goss, a third-party.

Respondent argues, "There is simply nothing remarkable about this case that would warrant this Court exercising jurisdiction" (*Opp. Br.*, p. 11, ll. 15-17). This case is so remarkable it defies imagination of reasonable people. This case is a "cat's paw" scenario where the "smart monkey" is Respondent's legal counsel, who under color of law, perpetrated acts of fraud and evidence tampering upon a Federal District Court and a third-party as the "unsuspecting cat(s)", as perverse means to cause wrongful adverse action(s) against a Title VII litigant.

McKenna does not seek to hold employers liable for acts of "former employees" (*Opp. Br.*, end p. 16, to begin p. 17). McKenna simply seeks to hold employers liable for *any* "clever" act(s) of its agents, using *any* third party, "former employee" or *not*, as a "cat's-paw" to punish Title VII litigants.

McKenna's position in this case is perfectly inline with this Court's holding that; "An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace." *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2412 (2006).

II. "Attorney Misconduct" Conflict of Interest:

McKenna could not raise this issue prior to Respondent's Appearance of Counsel. Accordingly the issue has just now ripe to raise before this Court. Jurisdiction of this case arises from U.S. District Court, Southern District of Ohio. As such, the *Ohio Rules of Professional Conduct* (ORPC) govern the conduct of the Attorneys in this case.

Both Dickerson and Secrest as identified as "Counsel of Record" on the cover of the Respondent's Brief in Opposition, are the same individuals who McKenna *evidences* [1] perpetrated acts of fraud, evidence tampering, upon the District Court and a third party as a means to impose extremely perverse acts of retaliation against McKenna. Accordingly it is inarguable that Respondent's Counsel of Record are material witnesses in *this* case. Not only does this evidence "unbecoming" conduct; ORPC Rule 3.7(a) states: "A lawyer shall *not* act as an advocate at a

---

[1] Statement #23 at Appendix p.28, Case: 2:08-cv-**00253**-ALM-TPK Doc #: 9-1 Filed: 04/14/08 Page: 41 of 45 PAGEID #: 86 (un-redacted email),

- Compare to: -

Statement #25 at Appendix p.28, **Case: 2:05-cv-00976**-ALM-TPK Doc #: 71-1 Filed: 01/19/07 Page: 2 of 2 PAGEID #: 856 (**redacted** email)

trial in which the lawyer is likely to be a necessary witness ...".

Accordingly, McKenna respectfully requests this Court dismiss any representations made by Brian E. Dickerson and Jonathan R. Secrest as advocates in this proceeding.

III. FRAUD - From Front Cover, to Back Cover.

A. Front Cover - Fraudulent "Corporate Disclosure Statement"

McKenna is *not* a financial expert, thus McKenna's assertions on this subject are not dispositive. However, "common sense" dictates it is *brutally* obvious that the economic giant known as "Nestle" has vested interest in a company by the name of "*Nestle* Purina PetCare Co.".

Page "ii" of Respondent's Brief states: "Respondent Nestle Purina PetCare Company *does not have a parent corporation*". However, that representation is not only contrary to common sense that "Nestle" has vested interest in a company by the name of "*Nestle* Purina PetCare Co.", but is also contrary to facts asserted on *Nestle* Purina's Internet web-site

> "On December 12, 2001, Ralston Purina Company was acquired by Nestlé S.A. Ralston Purina was then merged with a subsidiary of Nestlé. The resulting company, Nestlé Purina PetCare Company, is not a publicly traded company. Nestlé Purina is a wholly-owned subsidiary of Nestlé Holdings, Inc., which is

owned by Nestlé S.A., Avenue Nestlé 55, 1800 Vevey, Switzerland."

(http://www.nestlepurina.com - 08/06/2010)

Furthermore, According to the "Financial Statements 2009" available at the right-hand side of the "Investor Relations" web-page [2] of Nestle's Internet web-site, "*Nestle*" holds "**100% capital shareholdings**" in "Nestlé Purina PetCare Company St. Louis (Missouri)".

B. Back Cover - Fraudulent "Issues Not Raised Before the Lower Courts"

On the last page (p. 22) of the Respondent's Opposition Brief, Nestle fraudulently asserts: "Petitioner attempts to raise issues regarding Respondent's harassment of Petitioner. *Pet.*, pp. 10-12. These issues were not raised in front of the District Court or the Circuit Court.".

Ironically, that is *essentially* the same argument Nestle made to the Circuit Court on May 21, 2009 when McKenna had not only *previously* raised the issue before the Circuit Court, but McKenna had also articulated how that issue was *also* sufficiently raised before the District Court:

> "This conversational email exchanged *ensued only after McKenna was being sexually harassed by none other than Nestle/Dickerson*, based upon, and only after, an instigating/

---

[2] http://www.**nestle**.com/InvestorRelations/Investor+Relations.htm: At the right-hand side of the Internet web-page "Documents" – "**Financial Statements 2009**". Please see the 92nd page of the PDF document, identified as page "131".

> harassing email sent to McKenna by **Nestle/ Dickerson on January 13, 2007 @ 12:46 PM,** where Dickerson, as legal counsel for Nestle states: "*... and see what explanations you have for Ms. Goss's testimony... ... to not only seek relationships with other woman, but men as well.*" (R. 2, Complaint, p. 7, Statement #20, please see also, R. 9-2, p. 36-45, with particular emphasis on the composition of *Id.* at **bottom of p. 40,41**). Nestle's/Dickerson's January 13, 2007 harassing email/ comment(s)." (emphasis in original) [3].

Nestle cannot plead ignorance to this issue being raised before the Circuit Court, Nestle drafted an entire section specifically responding to McKenna raising that issue:

> "**F. No Claim for sexual harassment was pled in the Complaint.**
>
> Now, for the first time, McKenna attempts to allege that Nestle, through its legal counsel, was sexually harassing McKenna. Brief, p. 7. *This is simply ridiculous* and demonstrative of McKenna's lack of legitimate claims. McKenna is clearly taking the proverbial "shotgun approach" and hoping this Honorable Court finds reason to remand this case." [4].

---

[3] Case: 09-3400 - Document: 00615539197 - Filed: 05/21/2009 – Docket Page: 8; [Numbered as *Appellant Brief* p. 7]

[4] Case: 09-3400 - Document: 00615574113 - Filed: 06/19/2009 - Page: 29

It is inarguable that Nestle knows this issue was raised before the Circuit Court.

Nestle's known to be false representation, of existing material facts, with intent of misleading this Court, with justifiable reliance upon a representation made upon this Court by a member of the Bar of this Court, results in Harm to McKenna, by this Court otherwise disregarding McKenna legitimately raising the issue before this Court; is the very definition of FRAUD.

IV. Respondent's Egregious Violation of a Standing Protective Order [5].

On page 3 of Respondent's Opposition Brief, Nestle references McKenna's harasser stating, "Goss previously provided two and a half days of deposition testimony that included allegations...". Nestle then sensationalizes Goss's *uncorroborated* vile laundry list of allegations against McKenna. Nestle is again attempting to fabricate a non-existent "causal connection" from Goss's deposition testimony to McKenna's "emotionally distressed" email. Nestle simply lusts over any opportunity to harass McKenna.

The simple fact is that the "causal connection" is inarguable [6]. Obviously McKenna's "emotion-ally distressed" email is in *direct opposition* to Dickerson's sexually harassing email plain and simple. That is exactly why Nestle's Legal Counsel engaged in unlawful evidence tampering by

---

[5] Case: 2:05-cv-00976-ALM-TPK Doc #: 77 Filed: 02/05/07 Page: 11 of 11 PAGEID #: 910

[6] Doc #: 9-1 Filed: 04/14/08 Page: 41 of 45 PAGEID #: 86

redacting that email, and by further perpetrating fraud upon the District Court and Goss to cause wrongful adverse actions against McKenna.

The District Court's issuance of a standing Protective Order on exactly these subjects obviously cannot deter Nestle. After SIX YEARS *and* a Court Order, it is clear, Nestle will not stop harassment of McKenna. Now, after SIX YEARS of Nestle's sponsoring harassment of McKenna, McKenna asks again: What does McKenna have to do to finally end Nestle sponsored sexual harassment of McKenna?

> "Thus, the current state of the record supports Mr. McKenna's request for a protective order on these subjects." [7].
>
> "Since Nestle does not argue that the ruling on these issues was either clearly erroneous or contrary to law, *that ruling will be upheld.*" [8].
>
> "Defendant's motions for reconsideration (#78)... ...DENIED" [9].

On August 07, 2006 McKenna filed a Motion for a Protective Order limiting the scope of matters, which may be raised within the proceedings. McKenna's motion specifically cited "**Future Discovery (Deposition):**", and in specific regards to Nestle's upcoming intrusive deposition of Nancy J.

---

[7] Doc #: 77 Filed: 02/05/07 Page: 11 of 11 PAGEID #: 910
[8] Doc #: 97 Filed: 09/24/07 Page: 4 of 8 PAGEID #: 1410 at ¶2
[9] Doc #: 97 Filed: 09/24/07 Page: 8 of 8 PAGEID #: 1414

Goss [10]. The matter was fully briefed on August 31, 2006 [11].

On October 06, 2006 McKenna pleaded with the District Court to "expedite" ruling on McKenna's motion for a Protective Order [12].

On October 17, 18, and 19, 2006 Nestle conducted unabated deposition of Goss including those matters prohibited by the scope of the Protective Order McKenna sought to have in place *months prior* to conducting depositions.

On February 05, 2007 the District Court GRANTED McKenna's motion for a Protective Order.

> "[T]he Court does not believe that inquiries concerning Mr. McKenna's relationship history have anything to do with the single claim of discrimination propounded in this case relating to a very abbreviated time frame between when he first notified Nestle officials that he was being harassed by Ms. Goss and when his employment was terminated, a period of less than two months. Further, they do not relate to the proffered reason for Mr. McKenna's termination, nor would it appear that they are an effort to *acquire evidence* which, if it had been known to Nestle at the time, would have supported the termination of Mr. McKenna's employment. It does not appear that Nestle would have refused to hire, or would have discharged, individuals who either engaged in extramarital affairs or who

---

[10] Doc #: 51 Filed: 08/07/06 Page: 4 of 8 PAGEID #: 687
[11] Doc #: 57 Filed: 08/31/06
[12] Doc #: 60 Filed: 10/06/06

> fathered children out of wedlock. Thus, the current state of the record supports Mr. McKenna's request for a protective order on these subjects." (emphasis added) [13]

On February 15, 2007 Nestle filed a desperate Motion for Reconsideration regarding the District Court's Protective Order. Nestle *specifically* cited virtually verbatim those same sexual matters before the District Court, which Nestle again raised before this Court on page 3 of the Respondent's Brief! As Nestle themselves stated, "Nestle is now precluded from seeking further [litigating] on these issues" [14].

On September 24, 2007 the District Court affirmed stating, "Since Nestle does not argue that the ruling on these issues was either clearly erroneous or contrary to law, *that ruling will be upheld.*" [15]. "**Defendant's motions for reconsideration (#78)... ...DENIED**" [16].

In sum, a standing Protective Order is in place prohibiting Nestle from further harassing McKenna on these issues. Nestle remains undeterred by Orders of the Federal Judiciary in Nestle's resolve to impose unlawful harassment upon McKenna.

Nestle's message is unmistakable; Nestle will do as Nestle pleases, and there is nothing McKenna or the Federal Courts can do to stop them.

---

[13] Doc #: 77 Filed: 02/05/07 Pages: 10-11 of 11 PAGEIDs #: 909-910

[14] Doc #: 78 Filed: 02/15/07 Page: 5 of 8 PAGEID #: 918 at ¶ 3

[15] Doc #: 97 Filed: 09/24/07 Page: 4 of 8 PAGEID #: 1410 at ¶2

[16] Doc #: 97 Filed: 09/24/07 Page: 8 of 8 PAGEID #: 1414

V. Respondent's Diatribe on *Twombly* is Inapposite to the Material Issues in the Case:

Nestle's diatribe on *Twombly* spanning an unbelievable ten (10+) pages of Respondent's Opposition Brief is nothing more than a excruciatingly painful attempt at creating a red herring, and is best left forgotten!

A. *Twombly* is Inapposite to Petitioner's Reliance on *Conley*:

To be Clear: McKenna's stated reliance upon *Conley* has nothing to do with the "no set of facts" language that *was* discussed by this Court in *Twombly*, and has everything to do with, "The Federal Rules reject the approach that pleading is a game of skill..." language in *Conley* relied upon by this Court in *Foman v. Davis*. (*Pet. Br.*, pp. 25-26).

Nestle's conclusory assertion that, "Effectively, *Twombly* abrogated *Conley*. As such, Petitioner's reliance on *Conley* is misplaced" is utterly laughable! (*Opp. Br.* p. 6, ll. 23-24). McKenna's stated reliance on *Conley* has nothing to do with the *Conley's* "no set of facts" language as *was* discussed by this Court in *Twombly*.

B. *Twombly* is Not the Legal Basis Relied Upon by Lower Court's in Dismissal of McKenna's Complaint:

To be clear: Nestle, the District and Circuit Courts specifically relied upon the fact that McKenna had allegedly failed to allege a "*prima facie*" case of retaliation. The lower Courts held McKenna's

pleading requirements to inapposite *summary judgment* evidentiary standards (Appendix p. 6, and p. 16, respectively). In support of that judgment, the District and Circuit Courts both cited *differing* summary judgment evidentiary standards to support that McKenna had failed to allege a "*prima facie*" case (*Fenton v. HiSAN*, 174 F.3d 827, 831 (6th Cir. 1999), and *Hawkins v. Anheuser- Busch, Inc.*, 517 F.3d 321, 345 (6th Cir. 2008) respectively).

Now the Respondent lobbies this Court to now hold McKenna's *pro-se* complaint under a new *Twombly* standard most favorably to the Respondent. *Twombly* is not the standard relied upon by Nestle and the lower Courts in dismissal of McKenna's Complaint. The lower Courts did *not* discuss the *plausibility* of McKenna's Complaint as contemplated by this Court in *Twombly*. The lower Courts discussed whether McKenna failed to state a "*prima facie*" case of retaliation, and if acts by the Respondent which caused emotional/psychic harm to McKenna was "serious and of such a nature that no reasonable person could be expected to endure it".

VI. Respondent Concedes Nestle's Motion and Lower Courts' Dismissal of McKenna's Complaint was unwarranted.

A. "Count 1" of McKenna's Complaint:

In the Respondent's brief, Nestle now finally concedes McKenna's Complaint should have withstood a motion to dismiss (*Opp. Br.*, p. 13, ll. 12-16):

> "Had Petitioner simply alleged that Respondent caused a criminal complaint to be

> filed against him because he engaged in protected activity then arguably such allegations would have withstood a motion to dismiss"

Are you kidding? Clearly upon *plain reading*, let alone "liberal construction" of a *pro-se* Complaint, that is virtually indistinguishable from statement "1." of McKenna's Complaint (Appendix p. 20). The two passages are placed side by side with annotations added, so that Nestle's proposed verbiage can be transposed onto McKenna's Claim:

> **Nestle's proposed verbiage** (*Opp. Br.*, p. 13, ll. 12-16):
>
> "Had Petitioner simply alleged that *Respondent* (A) *caused* (B) a *criminal complaint* (C) to *be filed* (D) against *him* (E) because (F) *he engaged in protected activity* (G) then arguably such allegations would have withstood a motion to dismiss".
>
> **McKenna's Claim** (Appendix p. 20):
>
> "Nestle Purina PetCare Co., [*Respondent* (A)] by no less than, instigating [*caused* (B)] the filing of [*to be filed* (D)] false criminal charges [*a criminal complaint* (C)] against me [*against him* (E)], for [*because* (F)] my filing charges unlawful discrimination (opposition) against Nestle Purina PetCare Co., and directly participating proceedings (participation) against unlawful employment practices [*he engaged in protected activity* (G)]

It is precisely this type of ***Clintonesque*** *battle with* ***semantics*** that McKenna's Petition referred to on page 24, citing favorable concurrence of the Circuit Courts, "... the intent of Congress is not hampered by a combination of a strict construction of the statute in *battle with* ***semantics***" (*emphasis* ***added***). This sort of litigation antics is demonstrative of Nestle's vexatious litigation practices.

B. "Count 2" of McKenna's Complaint:

At pages 19-20 of the Petitioners Brief, McKenna raised that the emotional/ psychic harms in the *employment discrimination context* which McKenna **inarguably** *did* suffer as a *direct* result of Nestle's actions, were unlawfully bifurcated, then unlawfully imposed an inapposite bar to relief as is requisite under Restatement of Torts "Intentional Infliction of Emotional Distress". At pages 27-29 McKenna cited this Court's standards of harms within the *employment retaliation context.*

Respondent's Opposition Brief completely failed to oppose this issue. Respondent's complete failure to oppose this issue, clearly constitutes a concession by waiver on the issue of Respondent's liability regarding emotional/psychic harms which McKenna **inarguably** *did* suffer as a *direct* result of the cumulative affects of Respondent's perverse actions taken against McKenna [17].

—

[17] S. Ct. R. 15.2 states: "Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition."

VII. Other Acts of "Attorney Misconduct" Perpetrated Upon the Federal Judiciary:

Beyond the acts of "Attorney Misconduct" raised within McKenna's Petition and the acts of "Attorney Misconduct" detailed within this Reply Brief; substantial, well evidenced complaints of "Attorney Misconduct" are presently pending in *both* the Circuit and District Courts:

Pending Circuit Court Complaint: As detailed in McKenna's Application 09A1047 in this case: On January 11, 2010 pursuant to 6 Cir. Rule 46, McKenna filed a formal complaint of "Attorney Misconduct" with the Sixth Circuit of Appeals. On February 2, 2010, the Circuit Court issued notice indicating McKenna's complaint had been docketed as **Case No. 10-9501** (09A1047, Attachment A, p. 15). The issue of FRAUD that was filed with the District Court on August 3, 2010 was also supplemented to McKenna's **Case no. 10-9501** with the Circuit Court on August 2, 2010.

Pending District Court Complaint: On August 3, 2010 McKenna filed "Plaintiff's Motion to Set Aside a Judgment for Fraud on the Court" [18]. Within McKenna's Motion to Set Aside and the accompanying attachment, McKenna presents inarguable citations and exhibits *evidencing* material act of fraud perpetrated upon the lower Courts in the underlying case.

---

[18] Case: 2:05-cv-00976-ALM-TPK Doc #: 176 Filed: 08/03/10 Page: 1 of 6 PAGEID #: 4018

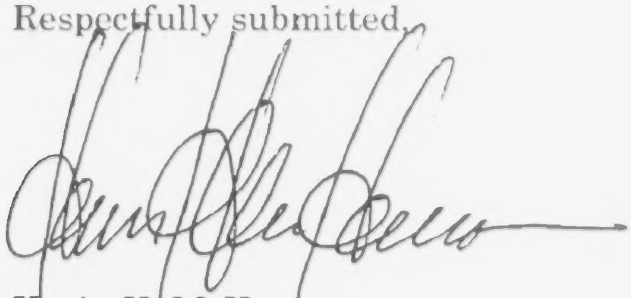
Regardless of whether the *numerous* acts of "Attorney Misconduct" referenced above are able to sustain on the merits for each alleged act of misconduct standing alone, the sum of those acts minimally establish "conduct unbecoming a member of the Bar of this Court" in violation of Rule S. Ct. Rule 8.1.

Accordingly McKenna requests Respondent's Counsel minimally be suspended from all proceedings before this Court, and disregard any merits represented by the Respondent's Opposition Brief.

CONCLUSION

McKenna has presented "clear and convincing evidence" to this Court evidencing Nestle has perpetrated frauds upon this Court, and the lower Courts. Accordingly, McKenna respectfully requests this Court justly enter an Order of Default Judgment in both of McKenna's pending cases against Nestle.

Respectfully submitted,



Kevin H. McKenna
Petitioner – Pro Se
4885 Adamsville Road
Zanesville, Ohio 43701
(740)452-3124